Supreme Court of the United States.

October Term, 1883.

ASENATH A. WARE et al., Appellants,
vs.
THE GALVESTON CITY COMPANY.
No. 264.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

BRIEF FOR THE GALVESTON CITY CO.

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The appellants brought suit, as the sole heirs of David White, deceased, against the appellee in the Circuit Court of the United States for the Eastern District of Texas, October 11, 1880.

The defendant appeared and demurred to the bill, and the demurrer was allowed. The complainants thereupon amended their bill. The demurrer was renewed to the bill as amended, and was again sustained. The complainants not asking leave to amend further, the bill was dismissed, and the complainants appealed. The facts of the case must, therefore, be gathered from the bill as amended. No synopsis would relieve the court from the necessity of a careful scrutiny of the allegations of the bill *in extenso*, and, therefore, no formal statement of its contents will be made.

The bill charges the defendant with liability for an unpaid residue of Menard's debt to White, on the ground that

the defendant was Menard's undisclosed principal in the contract with White. This liability seems to be regarded by the complainants as the foundation of their claim to equitable relief, and, therefore, calls for some preliminary consideration.

The bill discloses, on its face, that the defendant never in fact incurred liability as debtor to White or the complainants. The debt to White was Menard's personal indebtedness. Even his original nine associates were not liable to White, either as Menard's undisclosed principals or as his partners.

Not as undisclosed principals; for the bill does not allege that they were unknown to White—that he did not know who were the persons described in the Congressional grant as Menard's associates. Yet he dealt exclusively with Menard and the land.

Nor as partners; for the allegation that the associates were co-partners, not by virtue of any partnership dealings, but simply by having in view a joint stock company—co-partners merely to form a partnership—is tantamount to an allegation that they were not co-partners at all. It leaves them mere co-proprietors until the formation of the joint stock company; and so the law considers them.

Wordsworth's Law of Joint Stock Cos. (10th Ed.), p. 36.

Capper's Case, L. J. 1851, Ch. 150.

James's Case, *Id.*, 277.

1 Coll. on Part. (6th Ed.), p. 809, n.

But if the associates were originally liable to White, as Menard's principals or partners, or if they afterward assumed liability to White by simply reserving shares of stock as a provision for the payment of Menard's debt, their liability, in either case, was an individual liability, and affected themselves only. It created no corporate liability whatever.

Neither the joint stock company organized in '38, (including not only Menard and his nine associates, but also Triplett and his associates, and the purchasers of the thirty-

who may have become stockholders by exchange of certificates,

three shares sold out of the previous issue, and all others who before organization purchased shares from the original distributees,) nor the corporation created in '41, became liable, by the mere operation of law, and without any act of its own, for the debt to White incurred by Menard in '36, even if Menard be regarded as at that time a promoter of the stock company organized under the instrument of June 15, '37.

The Rockford &c. R. R. Co. *vs.* Sage, 65 Ill., 328.

Franklin Fire Insurance Company *vs.* Hart, 31 Md., 59.

Marchand *vs.* The Loan &c. Association, 26 La. Ann., 389.

N. Y. & N. H. R. R. Co. *vs.* Ketchum, 27 Conn., 170.

Wordsworth's Law of Joint Stock Cos. (10th Ed.), 12, and n. b.

Green's Brice's Ultra Vires, Ch. 7.

Or even if the associates were partners, and the debt was a partnership debt.

The Georgia Co. *vs.* Castleberry, 43 Ga., 187.

No act of the joint stock company or of the corporation, that would make either liable for Menard's debt, is alleged in the bill.

Taking a conveyance of the land was not such an act. For, granting that a contract may be made by promoters for the benefit of a company in contemplation, and that the company, when formed, by availing itself of the benefits of the contract, may assume its obligations, yet obviously that is not the present case. Aside from the fact that Menard was not acting as a promoter of the company actually formed, while he was engaged in the attempt to form two other companies,* *i. e.*, until after April 18, '37,—his debt to White was not incurred for the benefit of any contemplated company. The arrangement with White was intended simply to enable Menard and his associates to get a title to the land. It was solely for their benefit, and in their interest.

* the attempt to form one of which had proceeded as far as the issuance of 400 shares

The fact that they intended, on acquiring a title to the land, to sell it to persons who would form a stock company with the land for its capital, did not make either the purchase of the land from the Republic, or Menard's contract with White for the advancement and repayment of the purchase money, a purchase or a contract for the contemplated stock company—in its behalf or interest. The intention was that White should be paid by Menard before the formation of any company, so that the money could not have been borrowed for any company; and the sole consequence of the non-payment of White's claim in full before the conveyance of the land to the company actually formed, was that the latter took the land subject to the mortgage. That conveyance did not, in the least, affect White's claim or security—neither impaired nor enlarged the one or the other—created no new liability to him—did not make the company his debtor on Menard's contract, any more than a conveyance of the land subject to the mortgage would have made an individual grantee personally liable to White for Menard's debt.

Nor did the joint stock company expressly assume Menard's debt to White. There is no allegation of any such assumption—none whatever. On the contrary, the bill shows that such an assumption was never intended, but was carefully guarded against. The trust deed, under which the company was organized, expressly provides for the payment of the debt out of the proceeds of the first sales of shares by the commissioners (*i. e.*, before any stock company could, in the nature of things, be formed), and in such a way as to fall exclusively upon Menard and his nine associates. So, too, when the plan of selling the shares failed, and a distribution among the parties in interest was agreed on, the reservation of a part of the shares for the payment of Menard's debt clearly negatives any intention that the company, when formed, should become liable for that debt; and by this arrangement, too, the debt was to be paid by Menard and his nine associates, the reservation being made out of their ~~two thirds~~ quota of the stock.

Nor did the *corporation* expressly assume Menard's debt. There is no allegation of such an assumption at any time—not even by the action of the board on Menard's memorial in 1851. The allegation is that that action was a virtual admission that the defendant was the "original debtor" to White, as Menard's "undisclosed principal" in '36, before there was any company in existence.

Record, p. 9, par. 55; p. 8, par. 52, &c.

Moreover, the board clearly had no intention to assume Menard's debt to White; its evident design, and the whole scope of its action, being simply to extend relief to Menard personally.

Nor had the board the power to bind the defendant to pay Menard's debt without any consideration moving to the defendant, and no consideration is alleged.

1 Redf. on Railw., 583, and n. 15.

The Georgia Co. *v.* Castleberry, 43 Ga., 187.

Besides, the resolution was in no case an acknowledgment or promise to the complainants. They were strangers to it, and can take no benefit from it.

Nor was it a promise or memorandum thereof, in writing, signed by one duly authorized, as required by the Texas statute of frauds.

Paschal's Dig., Art. 3875.

In fact, it was no promise at all.

Thus it appears on the face of the bill that the liability to White was Menard's personal liability, first and last, or, at most, that of himself and his nine associates, individually, though secured by a mortgage on land subsequently conveyed to the joint stock company and to the defendant, neither of which, however, came under any liability as debtor to White or the complainants.

Taken in connection with the allegation, distinctly made (Record, p. 2, par. 8; p. 4, par. 22), that the so-called partnership of the ten associates was Menard's principal for which he incurred the debt to White, and with the allega-

tions as to the formation and organization of the joint stock company, and as to the incorporation of the defendant, the allegation that the incorporated company was Menard's principal in 1836, and in that character originally liable for the debt to White, is clearly seen to be the allegation, not of a fact, but of a conclusion of law, or inference, deduced from the assumption that the ten associates were a partnership, and the further assumption that this partnership, the joint stock company and the corporation, were, of course, all one and the same continuous legal entity, affected with the same liability to White, and having the same agent, Menard.

It is unnecessary to do more than point out these assumptions and the character of the allegation founded upon them. They sufficiently attend to their own criticism.

The matters of equitable cognizance presented in the bill are (1) the express trust for White that the court is asked ~~first~~ to decree to have been created in the reserved shares, and then to enforce as to 29 of them; and (2) the mortgage on the defendant's land, whose foreclosure is sought by way of alternative relief.

I.

The bill fails to show that the defendant ever incurred liability to White or the complainants, as trustee of the shares reserved for the payment of Menard's debt to White.

It does not allege that any trust was ever created. All that it *alleges* on this subject is to be found in paragraph 22 (Record, pp. 3 and 4), where it is said that the commissioners, with the approval of the associates, put aside and reserved shares, to be held by the company itself, as a provision and trust in its hands for the payment of White—implying nothing but an intention to create an express trust *in futuro*, an intention nowhere alleged to have been executed. Every

, by the sale of the land:- ~~a mortgage being~~,
by more exas law, not a conveyance of the fee, but a
lien, enforceable only by a sale.

later mention of shares as "placed in the hands of the company," or "held by" the company, or "given to the company in trust," or "belonging to the company in trust" (p. 4, par's 26 and 27; p. 5, par's 33 and 34; p. 7, par's 43 and 47), is but a reference to a trust whose previous creation is assumed to have been already alleged, but is not alleged, in this paragraph. When the bill seeks (pp. 5 and 6, par's 33 and 37) to charge the defendant with selling a part of the reserved shares and applying the proceeds to the payment of White's claim, and with entrusting the rest of them to Menard for the same purpose, in 1838–9, and would have it implied that this was a recognition and part performance of a trust, the trust referred to is the one whose previous creation is assumed to have been already alleged in this paragraph. And when the bill (pp. 7, 8, and 9, par's 47, 49, 52 and 53) seeks to construe the action of the board on Menard's memorial in March, '51, into a virtual admission that the defendant then held as trustee, upon an express trust for White and his heirs, the twenty-nine of the reserved shares then in Menard's hands and control, it clearly appears that the trust claimed to have been so admitted is the one whose previous creation is assumed to have been already alleged in this same paragraph. That is, the bill everywhere rests upon this allegation as the sufficient and only allegation of the creation of the trust it is seeking to enforce.

As alleging a mere intention to create a trust, the bill is fatally defective (Lewin on Trusts, 7th Ed., 62).

But if it were distinctly alleged in this paragraph that a perfectly created trust in the reserved shares was fixed upon the defendant at the date of the reservation, the allegation could serve no useful purpose. The bill shows that the defendant was not then in existence to take and hold as trustee. Not even was there then a single owner of stock, or a single share of stock, in being—no shares having as yet been either sold or exchanged or distributed. Shares first came into existence at the distribution, alleged in the bill to have been subsequent to

the reservation (p. 4, par's 22 and 26), and then only those shares that were taken by and issued to the distributees. The first company actually formed was the joint stock company, and that company was not organized till April 13, '38 (p. 4, par. 28), and did not exist before that date.

Not only was there no company to take a trust at the date of the reservation, but the reserved shares were then incapable of being placed in the hands of a trustee. They were still unissued, and, before their issuance, no one held either the legal or the equitable title to them, even in expectancy, and no one could create a trust in them. This is not denying the power of the commissioners, with the consent of the associates, to create a trust in these shares by issuing them to some one capable of taking and holding a trust. But issuance is not alleged—only reservation.

But if issuance were alleged, and an issuance in trust, the question would arise, to whom as trustee? Certainly, the trust referred to in the bill is assumed to have been in existence before the organization of the joint stock company; for the placing of the shares in the hands of "the company" as a provision for the payment of White's claim is clearly referred to (p. 4, paragraphs 22, 23, 26) as having been prior to the distribution. The trust, then, whose creation is not alleged, is assumed to have been fastened on the unorganized "company" even before there were any shareholders, and to have been transmitted by that nondescript "company" to the organized association, without any act of the authors of the trust—no act of theirs subsequent to the distribution being anywhere alleged.

The bill neither alleges nor intimates the creation of any trust after April 13, '38—the issuance or assignment of any shares to the organized joint stock company, or the placing of any stock in its hands in trust. And, clearly, *that* company was incapable of taking and holding a trust, whether

by original creation or by transmission, being an unincorporated association.

Baptist Association *v.* Hart's Executors, 4 Wheat., 1.
Owens *v.* The Missionary Soc. &c., 14 N. Y., 380.
Green *v.* Allen, 5 Humph. (Tenn.), 170.
Goesele *v.* Bimeler, 5 McLean, 223.
Pars. on Part. (3d Ed.), 37.
Tucker *v.* Seaman's Aid Soc., 7 Metc., 188, recognizes this as the rule.

Some cases have sustained a devise to such an association in trust for a charity, but probably no case has gone farther than this.

Nor under an intention or an attempt to make the association a trustee did the individual partners take as trustees, or did the subsequently created corporation take as trustee (4 Wheat., *supra*).

The first company that could have taken and held the shares in trust was the corporation created February 5, 1841, and there is no intimation in the bill of the creation of any trust on or after that date. No issuance or assignment of the shares to the corporation is alleged—no placing of them in its hands. But it is assumed that, by virtue of the act of incorporation, the trust in the shares passed on from the joint stock company to the defendant, and possession of them passed from Menard as agent of the former to Menard as agent of the latter.

In support of this assumption, the bill sets forth the memorial and resolution of March, '51, and construes them as a virtual claim by Menard, and a virtual admission by the defendant, that this was actually the case—that the latter was the trustee of this trust created, not after incorporation, but before distribution, and transmitted by occult operation of law through the joint stock company to the corporation without any act of the authors of the trust or of the corporation; for, again, no act of either is alleged.

An admission of that sort, if expressly made, would clearly be of no effect.

1 Pars. on Con., 437.

Vincent *v.* Chapman, 10 Gill and J., 279.

It is, therefore, unnecessary to show that no such claim and admission are contained in the memorial and resolution as set forth in the bill; that what the former asked, and the latter granted, was merely the partial indemnification of Menard against a personal loss.

If the bill clearly alleged, as a matter of fact and not as mere construction of law, that the joint stock company had possession of the reserved shares, to sell them and apply the proceeds to the payment of White's claim, and placed them in the hands of Menard, as its agent for the same purpose, on or before November 7, '38, this allegation could not be relied on as a sufficient averment of an implied or constructive trust for White growing out of such a possession.

a. As the bill clearly seeks to affect the defendant with an express trust created before the distribution, it cannot rely, either cumulatively or in the alternative, on an implied trust originating after the distribution.

It must make its election and abide by it.

Rowell *v.* Freese, 23 Me., 182.

Hill on Trustees (4th Am. Ed.), marg. p. 91, n. 4.

b. The joint stock company could not take and hold the shares as a trustee upon a trust of any kind.

c. If the certificates were in the hands of the joint stock company, without assignment, but with a legal authority to sell and transfer them, *i. e.*, as a mere agent to make the sales and apply the proceeds to the payment of White's claim, and if the company could take upon itself an agency for that purpose, still there would be no perfectly created trust for White until the company had attorned to him and he had assented to the attornment.

Till then the company would be the agent of the ten associates (alleged to have been the owners of the shares), and

not White's agent or trustee. Till then there would be no privity between White and the Company—no liability of the latter that the former could enforce: and this, too, though the bill had not expressly alleged (what would have been obvious without allegation, Bill *v.* Cureton, 2 Myl. & K., 511), that the reservation was for the benefit of Menard and his nine associates.

National Bank *v.* Grand Lodge, 98 U. S., 123.
Butterfield *v.* Hartshorn, 7 N. H., 345.
Simonton *v.* First National Bank &c., 24 Minn., 216.
Story on Contracts, sec. 485.
Story on Bailments, sec. 210.
Story on Agency, sec. 465.
2 Story's Eq., sec. 1196.
Brind *v.* Hampshire, 1 M. & W., 365.
Williams *v.* Everett, 14 East., 597.
Wedlake *v.* Hurley, 1 Crompt. & J., 83.
Owen *v.* Bowen, 4 Carr. & P., 93.
Gibson *v.* Minett, 1 *Id.*, 247.
Gerrard *v.* Lauderdale, 3 Sim., 1.
Yates *v.* Bell, 3 B. & A., 643.
Steele *v.* Murphy, 4 Moore's P. C. Cas., 445.
Hughes *v.* Stubbs, 1 Hare, 476.
Hill *v.* Royds, Law R., 8 Eq., 290.
Page *v.* Brown, 4 Russ., 6.

The bill alleges no attornment to White—no communication to him of the holding of shares by the joint stock company for his payment—no assent thereto by him.

His knowledge will not be presumed without allegation. Nor would his knowledge imply his assent, as this would not have been to his advantage (24 Minn., *supra*). For even if his assent to such a provision for his payment would not have been a waiver of his better security—the mortgage on the entire tract—and of Menard's personal liability, yet the shares could have been no additional security to him. They could represent nothing not already covered by the mortgage—nothing but partial and remote and undivided

interests in the proceeds of the very land, the whole of which was already under mortgage to him.

The sale by Menard of some of the shares, and the application of the proceeds to the payment of White's claim, in 1838–39, was no attornment to White, even by Menard, as to the rest of the shares (Baron *v.* Husband, 4 B. & Ald., 24 Eng. C. L., 611); and was no attornment by the joint stock company, which is not alleged to have authorized Menard, expressly or impliedly, to bind it by an attornment to White; and was certainly no attornment by the corporation not then in existence.

The bill does not claim that the *defendant* ever attorned to the complainants—that the resolution of March, '51, operated as an attornment. On the contrary, it alleges that the defendant not only did not communicate the resolution to them, but even took especial pains that it should not come to their knowledge, and that it was wholly unknown to them until their accidental discovery of it nearly thirty years after its passage. No knowledge, no attornment; no attornment, no privity; no privity, no liability.

It is, therefore, unnecessary to question the power of the board to attorn to the complainants; its power to make the defendant an agent, or trustee, for a purpose outside the scope of its creation—an agent to sell property and pay a debt with which it had no further concern after both debt and mortgage had become barred by limitation.

A. & A. on Corp., secs. 256, 271.

Whatever the bill may contain, as allegation or assumption, with regard to the possession by the unincorporated association of the reserved shares upon a trust, express or implied, for White, and with regard to any recognition of *that* trust by the defendant on March 10, '51, being thus wholly ineffectual for any purpose whatever, it would be useless to show that the bill fails to allege, as a matter of fact, that any of the reserved shares ever came into the possession of the joint stock company, or of the defendant;

that all its allegations with regard to the possession of these shares by anyone else than Menard as the agent of the ten associates are, like the allegation of the existence of the defendant in '36 as Menard's undisclosed principal, mere allegations of conclusions of law. The bill, in effect, avers that the associates, the joint stock company and the corporation were all one and the same company, and that Menard's agency and possession for the first became, by operation of law, his agency and possession for each of the others, as they successively came into existence.

If there was ever any trust for White and his heirs, the complainants do not allege that it was a continuing, subsisting one at the filing of the bill—that the twenty-nine shares were then still held by the defendant. On the contrary, the bill admits the possibility that the defendant no longer had the twenty-nine shares in its custody and control, by its alternative prayer to meet that contingency (p. 11). No discovery is sought from the defendant whether or not it still had the custody and control of the shares. The object of the bill is to enforce a trust whose continued existence is a mere perhaps, not an alleged fact. For if the shares were no longer in the defendant's custody and control, the trust was at an end—whether the defendant had surrendered them to the associates, or had sold them and made use of the proceeds; and the complainants' remedy was an action at law for damages, or for money had and received. They have no standing in a court of equity (Kane *v.* Bloodgood, 7 John. Ch. 90; White *v.* White, 1 Md., Ch. Dec., 53; Trecothick *v.* Austin, 4 Mason C. C. 30).

The presumption raised by the bill itself is that the 29 shares were not in existence when this suit was brought. The last statement about them is that they were in Menard's hands March 10, '51, for the payment of White's claim then in suit. That suit was soon after dismissed for want of prosecution. In October, '80, there were

only 50 shares of stock, all told, that had not been extinguished in the purchase of lots from the defendant, and 10 of these had never been heard of since their issuance by the commissioners, and were believed by the defendant to be lost. The 29, then, must have been among the 950 extinguished shares, or among the 40 known and living ones, leaving only 11 others in existence. The bill makes no allegation, but leaves the matter merely to presumption; and the presumption is 24 to 1 that the 29 shares were no longer extant—that they had been used, after the dismissal of the suit against Menard, by him and his associates, or by their assignees, in the purchase of lots from the defendant. The extinction of the shares was, of course, the extinction of any trust in them.

In the presence of such an admission of the bill and such a presumption arising on its face, a court of equity would not, after the lapse of so long a time, enforce even an express trust that clearly once existed; much less will it imply both the unalleged creation and the unalleged continuance of a trust.

2 Story's Eq., 1520 *a*.

So far, then, as the suit is for the enforcement of a trust, the demurrer to the bill for the want of equity was well taken.

The demurrer on the grounds of limitation, lapse of time and laches would also be well taken, as to this part of the bill, if the question of the bar of a trust were involved in the case.

Had there been a constructive trust, originating in an agency, or bailment, or mandate, this would have been subject to the bar of the statute of limitations, and would have been barred long before the filing of the bill. The right of action would have accrued to White during the four years that elapsed between the reservation and his death.

Mitchell *v.* McLemore, 9 Tex. R., 151.
Conolly *v.* Hammond, 51 *Id.*, 647.
Wingate *v.* Wingate, 11 *Id.*, 430.

The bar would have been complete two years after the accrual of the right of action.

"All actions for detaining the personal property and for converting such personal property to one's own use * * * shall be commenced and sued within two years next after the cause of such action or suit, and not after."

Paschal's Dig., art. 4604.

Had there been an express trust for White, this suit would have been barred, in the circumstances of the case, by lapse of time and laches. For aught alleged, White knew of the reservation. He lived four years thereafter, and set up no claim as *cestui que trust*. His representatives (executor and administrator) are not alleged to have been ignorant of the reservation—only of the memorial and resolution. They took no steps to enforce a trust. It is too late, after the lapse of forty years, for the heirs to do so on the mere allegation that *they* were ignorant of the alleged trust.

Clarke *v.* Bowman, 18 Wall., 493.

But as the defendant is not shown by the bill to have been affected with any trust, express or implied, the question of the bar of a trust does not arise.

II.

(the only lien on the land)

The application for the foreclosure of the mortgage is altogether too late, coming, as it does, more than forty years after the execution of the mortgage, and more than thirty after the bar of the debt to secure which the mortgage was given. The bill does not allege a fraudulent concealment of the mortgage; does not allege even that the complainants were ignorant of the debt and mortgage, and of the conveyance of the land, and of its open, continuous, peaceable and adverse possession (as shown by the growth of a city upon it) for more than forty years by and under the mortgagor.

If through the assumed trust was not to hold indefinitely, but to sell & pay him the proceeds.

Such laches and lapse of time, wholly unexcused, constitute a fatal want of equity in the bill, and a bar to the suit; and the demurrer on those grounds was well taken to so much of the bill as seeks a foreclosure of the mortgage.

The suit for foreclosure is also barred by limitation. The debt to White was barred, if not before his death, certainly very soon after, by the Texas statute of limitations.

"All actions of debt, grounded upon any contract in writing, shall be commenced and sued within four years next after the cause of such action or suit, and not after" (Paschal's Dig., art. 4604).

This clause prescribes a limitation of all actions or suits, without distinction of terms, and without distinction between legal and equitable remedies, for the recovery of money upon contracts in writing (Robinson *v.* Varnell, 16 Tex., 389).

It is the well-settled law of Texas that a mortgage does not convey the fee; that it is a mere security for the debt, and barred with the debt.

Ross *v.* Mitchell, 28 Tex. R., 154.
Perkins *v.* Sterne, 23 *Id.*, 563.
Doty *v.* Graham, 12 *Id.*, 427.
Wright *v.* Henderson, *Id.*, 44; and Tex. R., *passim.*

The courts of the United States will follow these decisions.

Russell *v.* Ely, 2 Black, 575.
Ewbanks *v.* Leveridge, 4 Sawyer C. C., 274.

The bar of the right to foreclose was not prevented by the suit brought by White's administrator against Menard. There is no allegation that the suit was brought before the debt and mortgage were barred, or that the suit was for foreclosure—it could not have been, as the defendant would have been a necessary party to such a suit; and it was not prosecuted with diligence, but was allowed to be dismissed for want of prosecution.

Neither was the mortgage taken out of the bar by the action of '51.

Menard's memorial did not revive the debt, and so indirectly the mortgage as an incident thereto. That memorial was in no sense a promise or acknowledgment to the complainants. It was not addressed to them or to their agent or representative. They knew nothing of it. It seems well established, at last, that the acknowledgment of a claim, to take it out of the bar, must be made to the party claiming the benefit of it, and not to a stranger.

McGrew *v.* Forsyth, 80 Ill., 596.
Wachter *v.* Albee, *Id.*, 50.
Parker *v.* Shuford, 76 N. C., 221.
Faison *v.* Bowden, *Id.*, 425.
Sibert *v.* Wilder, 16 Kansas, 176.
Ringo *v.* Brooks, 26 Ark., 543.
McKinney *v.* Snyder, 78 Pa. St., 497.
Kyle *v.* Wells, 17 *Id.*, 286.
Bloodgood *v.* Bruin, 4 Seld. (N. Y.), 362.
Wakeman *v.* Sherman, 5 *Id.*, 91.
Farmers' &c. Bk. *v.* Wilson, 10 Watts, 261.
Farrell *v.* Palmer, 36 Cal., 187.
Collins *v.* Bane, 34 Iowa, 389.
Brailsford *v.* James, 3 Strobh. (S. C.), 171, (decided on another point, but recognizing this as clearly the law).
Craig *v.* Brown, 3 Wash. C. C., 503.
3 Pars. on Con., 85.

The resolution of the board did not revive the debt and the mortgage as its incident. The board could not revive Menard's debt, and there was no previous liability of the defendant to be revived. Even if there had been, the board had no power to revive a liability barred by limitation, without a new consideration to the defendant. (See Lowndes *v.* the Garnett &c. Gold Mine Co., 10 Law Times Rep. (New Series), 229, cited in 1 Redf. on Railw., § 140, Sec. 12, p. 583,

n. 15). And no new consideration is alleged. Nor had the board the power to revive, directly or indirectly, a lost lien on the company's land, created by Menard to secure his debt to White, without a new consideration to the company. This would be the same as giving away the company's property, which a board has not the power to do.

Field on Corporations, 151, 173.

If the debt and mortgage had been revived in March, '51, or acknowledged to be then still existing, as no promise to pay, and no acknowledgment, of later date is alleged, the right to a foreclosure would still be barred by limitation, lapse of time and laches. Nearly 30 years elapsed, after March, '51, before the institution of this suit.

Hughes *v.* Edwards, 9 Wheat., 489.

Perkins *v.* Cartmell, 4 Harrington, 270.

The only excuse offered by the complainants for their long delay is the fraudulent concealment from them, not of the debt and mortgage, but of the defendant's alleged liability as Menard's ~~undisclosed~~ principal in '36, and as the trustee of the express trust assumed to have been created before the distribution, and of the defendant's admission of such liability by the resolution of March, '51.

Such a concealment, if conceded, would be no excuse for the laches in foreclosing the mortgage.

With regard to these allegations of the fraudulent concealment of the defendant's liability as original debtor, and as trustee, it would be enough to say that there could be no concealment of what did not exist:—and that, as the defendant could not be bound by any admissions of such a liability made by the board in 1851, the defendant was not bound to communicate to the complainants any action of the board from which such admissions might be inferred.

But, superfluous as it is, the complainants' specifications

of the defendant's acts and omissions, amounting to a fraudulent concealment of this liability as debtor and trustee, will be noticed.

1. The order of April 21, 1858, prohibiting the inspection of the defendant's books, except in the presence of the board (P. 9, par. 54). This was seventeen years after White's death, and seven years after the action of March, '51, alleged to have been thus concealed.

The order was general in its terms, and could have had no special reference to this claim that had not then been made or heard of. It was, moreover, a perfectly proper order in itself, and all the more so, as the company was the source of title, by sale, donation and dedication, to every lot in the city of Galveston. The only wonder is that the company ever allowed the examination of its books and files by outsiders in search of defective titles to property, public and private, to become so general as to require the passage of such an order in the public interest, as well as for its own protection. And how does this order excuse the neglect of the complainants to examine the company's books during the seven years of free inspection before its passage, or their subsequent neglect to apply to the board for permission to make the examination under the terms of the order?

2. The defendant's refusal of the complainants' applications "at divers times between March 10, 1851, and January 31, 1880," to examine the defendant's books in search of *other* demands against the company (p. 9, par. 55). The applications were acts of amazing effrontery, and the refusal of them was perfectly proper. There is no allegation that the complainants were stockholders. They show no right, therefore, to inspect the defendant's books for any purpose —much less, in search of demands against the defendant.

Ang. & A. on Corp., secs. 681–2.

3. The defendant's omission to give any "intimation" to the complainants of their rights growing out of the fact that the defendant was White's original debtor as Menard's principal (p. 9, par. 55). That singular liability as origi-

nal debtor could, in no event, have extended beyond the land under mortgage, alleged in the bill to have been the defendant's sole capital (p. 5 par. 28); and of that liability the mortgage itself was the best possible information. It is not alleged, as we have already said, that the mortgage was concealed from the complainants or unknown to them.

4. Defendant's omission to give notice to the public, or to the complainants, of the trust deeds (pp. 9 and 10, par's 56 *et seq*). There is no allegation of the non-registration of the trust deeds by the parties to them, or by the joint stock company, long before the defendant came into existence. Nor do the complainants justify their alleged ignorance of those deeds by any explanation how they, for so many years, indulged the supposition that the joint stock company was organized with this land for its only capital, and went about finding purchasers and selling lots (its only business) from its organization in '38 till the defendant was chartered in '41, and that the defendant went on finding purchasers and making sales till January 1, '42 (the date of Menard's deed), without any recorded title to the land, and without any title whatever that could be ascertained by ordinary diligence or reasonable inquiry. They neither allege such inquiry nor offer any explanation why it was not made. In the absence of such allegations and explanations, non-registration of the trust deeds by the proper parties, and the complainants' excusable ignorance of them, if unregistered, will not be taken as implied in the vague and indefinite allegation of no notice by the defendant to the public or the complainants.

Furthermore, the trust deeds contained no information valuable to the complainants, and ignorance of their contents could not have been prejudicial to the complainants—the provisions of these deeds not being intended for White's benefit, and not creating any additional security or liability to him.

5. The defendant has at all times claimed title to the land through a chain of two links only—the patent to Menard

and Menard's deed of Jan. 1, '42, to the defendant—instead of a longer chain including the several trust deeds and the deed of two of the commissioners to the directors of the joint stock company (p. 9, par. 56, &c). In every suit for a lot within the limits of Galveston, whether brought by the appellee or by any other owner of the lot, and though brought against a mere trespasser, the plaintiff must make out his chain of title from the Republic to or through the appellee. This would involve proof of all the trust deeds set out in the bill, as well as the commissioners' deed (and these would bring the recorded title down only to the directors of the joint stock company), but for the fact that the defendant, the incorporated company, simplified and completed its record-chain of title by taking a conveyance direct from Menard to itself—a convenience to the defendant, and a continuing and ever-increasing benefit to the public. And now the complainants allege it as a fraud on them, that the defendant, having this deed, and, therefore, two chains of title, one short, simple and entire, the other longer, more complicated and incomplete, has at all times "claimed that it took its title" to the land through the former chain, and has "never claimed title" through the latter. "Claimed that it took its title to the land!" In what circumstances, on what occasions, by what acts, the defendant so "claimed," there is no hint in the bill. Possibly, in suits against trespassers, the defendant rested the proof of its title on the patent and Menard's deed. But why not charge this unconscionable conduct directly home upon the defendant, instead of veiling it in the obscure and vague phraseology of the bill?

These are the several fraudulent acts and omissions alleged in the bill in explanation of the complainants' ignorance of their rights and long delay in seeking to enforce them. Plainly, they are all of a sort. Which of them is the most curiously and conspicuously frivolous, it were hard to say. Taken all together, they amount to but this:—White and

by a questionable chain as to the 640 acres — the trust-deed of April 18/37 not authorizing a conveyance of two of the trustees only —

his Alabama executor and Texas administrator knew of the debt and the mortgage, and (for aught alleged) of the reservation of stock; the complainants knew of the debt and the mortgage; but White's representatives knew nothing of the memorial and resolution, and the complainants knew nothing of them, or of the reservation of stock, until within two years before the filing of the bill; Menard's debt was known to all parties, and allowed by them to become barred; but the fact that the *defendant* was Menard's "undisclosed principal" in '36 was not known to the complainants, though the bar of the debt as to Menard would be an effectual bar as to his "undisclosed principal;" the fact that the land was the security for the debt, and ample security, was known to all; but the fact that some of the shares of the stock, representing the land, and nothing else, were reserved by the owners of the land, to be applied to the payment of the debt, so that White might not enforce the mortgage, was not known to the complainants—both this and the defendant's original liability as "undisclosed principal" having been fraudulently concealed from them by these several acts and omissions.

If such excuses serve to take this claim out of the bar of laches, stale claim and limitation, it is difficult to see when those defenses could ever be available against speculative demands exhumed out of a past beyond the recollection of a single living witness. In this case, the complainants' only hope of success is evidently based upon the expectation that, owing to the death of Menard and of every other person connected with the reservation of shares, whether as associate or as commissioner, the defendant will be unable to prove the exact nature of the transactions of '36, '37, and '38, and to show the true intent of what the complainants obviously rely upon as their sole and sufficient means of proof—the memorial and resolution of March, '51.

The demurrer to the bill for want of parties was well taken. The heirs of Menard and his associates—of the alleged debtors and owners of the 29 shares—have the right to contest the complainants' claim, and either deny its original validity or show that it has been paid or extinguished by operation of law.

Russell *v.* Clarke's Exec'rs, 7 Cranch, 99.

In view of the fact that White chose a mortgage on the land as the security for his loan to Menard, the point made in the brief for the appellants, with regard to White's implied subrogation to the lien expressly retained by the Republic of Texas, can not be sustained.

Malone *v.* Kaufman, 38 Tex. 455.

Shelby *v.* Perrin, 18 *Id.* 516.

The bill shows no retention of such a lien. But the brief for appellants refers to the grant as judicially known to the Court. This grant (Laws of the Republic, Vol. 1, p. 70) makes White the agent of the Republic to receive payment for the land in New Orleans, in cash or acceptances satisfactory to him. The bill shows that he received his own acceptance as satisfactory to himself. How by such an act he could become entitled in equity to be subrogated to a lien retained by the Republic, it is not easy to see.

Whether even an express lien would not be barred by 40 and odd years of unexcused laches—there can be no pretence of the appellants' ignorance of whatever lien there may have been—it is needless to inquire.

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~~# though it could not be collected by the Republic after his death in Dec'41~~

tho' he did not collect them for the Republic at their maturity & the money was not paid till after his death in Dec '41—(paragraph 3 of the bill).